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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR GARZA,

Defendant and Appellant.

F071622

(Super. Ct. No. CF97599251)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Denise Lee Whitehead, Judge.

Laura P. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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The trial court denied Hector Garza's petition to have his felony conviction for possession of cocaine base reduced to a misdemeanor pursuant to the provisions of the Safe Neighborhood and Schools Act, Proposition 47. The trial court concluded Garza

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\*Before Gomes, Acting P.J., Franson, J. and Peña, J.

was statutorily ineligible for reduction of his sentence. We affirm the order of the trial court.

### **FACTUAL AND PROCEDURAL SUMMARY**

On January 28, 2013, the trial court issued an order denying Garza's motion for reconsideration. From this document, we discern that in 2012, Garza had filed a petition for resentencing pursuant to the Three Strikes Reform Act of 2012, Proposition 36. The trial court denied the initial application and the motion for reconsideration because Garza's two prior strikes were for attempted murder (Pen. Code,<sup>1</sup> §§ 187, 664), and assault with the intent to commit a rape (§ 220). Pursuant to section 1170.126, subdivision (e)(1), Garza was statutorily ineligible for resentencing because the convictions were both violent felonies (§ 667.5, subd. (c)(12), (15)) and serious felonies (§ 1192.7, subd. (c)(9), (10)).

On December 10, 2014, almost two years later, Garza filed an application for reduction of a prior felony conviction to a misdemeanor pursuant to the provisions of Proposition 47.

On January 30, 2015, Garza filed a second petition pursuant to the provisions of Proposition 47.

On February 2, 2015, Garza filed a third petition pursuant to Proposition 47, this one entitled "Petition for Resentencing." We assume the trial court considered all three petitions as if only a single petition had been filed. The record includes two abstracts of judgment, one filed June 2, 1998, and the other filed November 15, 1983. The 1998 abstract establishes that Garza was convicted in 1998 of possession of cocaine base in violation of Health and Safety Code section 11350, subdivision (a). The 1983 abstract establishes that in 1982, Garza was convicted of attempted murder (§§ 187, 664), assault with intent to commit rape (§ 220), and witness intimidation (§ 136.1, subd. (c)(1)).

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<sup>1</sup>All statutory references are to the Penal Code unless otherwise indicated.

The trial court summarily denied the petition, finding Garza was ineligible for resentencing.

## **DISCUSSION**

Appellate counsel filed a brief asserting that after reviewing the record she could not find any arguable issues in the case. By letter dated August 27, 2015, we invited Garza to inform this court of any issues he would like us to address in this appeal. Garza did not respond to our letter. After a thorough review of the record, we agree with appellate counsel that there are no arguable issues in this case.

Garza was seeking resentencing pursuant to the Safe Neighborhoods and Schools Act as codified in section 1170.18. As relevant, this section permits a defendant to petition the trial court to have certain drug offenses reclassified as misdemeanors. (§ 1170.18, subd. (a).) A violation of Health and Safety Code section 11350 is one of these offenses, so we may presume Garza was seeking to have his 1998 conviction for possession of cocaine base reduced to a misdemeanor.

However, section 1170.18, subdivision (i) provides that its provisions do not apply to a person who has “one or more prior convictions for an offense specified in” section 667, subdivision (e)(2)(C)(iv). In turn, section 667, subdivision (e)(2)(C)(iv) lists various offenses considered to be serious and/or violent. Among the offenses listed are any attempted homicide offense (§ 667, subd. (e)(2)(C)(iv)(IV), and sexually violent offenses as defined in Welfare and Institutions Code section 6600, subdivision (b). Included in the definition of a sexually violent offense in Welfare and Institutions Code section 6600, subdivision (b) is a violation of Penal Code section 220 when that crime was committed by “force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person ....” Since the 1983 abstract of judgment indicates Garza committed his attempted murder, assault with intent to commit rape, and witness intimidation crimes on

the same day, the record strongly suggests Garza's violation of section 220 was a sexually violent offense.

Regardless of whether the record is adequate to conclude his conviction for violating section 220 was a sexually violent offense, Garza was clearly ineligible for resentencing under section 1170.18 because his attempted murder conviction is listed in section 667, subdivision (e)(2)(C)(iv)(IV). Therefore, the trial court properly denied his petition for resentencing pursuant to the Safe Neighborhoods and Schools Act.

#### **DISPOSITION**

The order denying the petition is affirmed.